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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 811

GENERAL IMPORT & EXPORT COMPANY, INC.,
PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 21, 1932

CERTIORARI GRANTED MARCH 28, 1932

(36,625)

(36,625)

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IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

v.

BRITISH SS. "SEBASTOPOL"

STATEMENT UNDER RULE 13, SUBDIVISION 4

Cause of Action: Forfeiture. Tariff Act of September 21, 1922, and Section 4179, U. S. R. S.

November 18, 1927, filed libel.

November 19, 1927, issued monition ret. 12/9/27.

December 9, 1927, filed monition—boat attached—notice given—proc. and default noted.

January 3, 1928, filed claim and stipulation for costs (General Import & Export Company).

January 3, 1928, filed answer of General Import & Export Company.

January 20, 1928, filed notice of motion for release of vessel upon filing bond at appraised value. Motion granted, Coleman, J.

January 20, 1928, filed order granting motion for release of vessel upon filing bond at appraised value. Fred Bickman, Louis Spitzer and James McAllister appointed Appraisers—Coleman, J.

[fol. 2] February 24, 1928, filed appraisal—$7,500.

February 24, 1928, filed stipulation for value $7,500—approved.

February 24, 1928, issued release.

December 19, 1928, Woolsey, J., case tried. Libel and 2 witnesses and 15 exhibits. Decision reserved.

January 12, 1931, filed amended answer to libel.

January 12, 1931, filed opinion 6247. Libel dismissed without costs—Woolsey, J.

January 27, 1931, filed final decree. Libel dismissed, Woolsey, J.

February 24, 1931, filed petition, notice and order allowing appeal, Bondy, J.

February 24, 1931, filed assignments of error.
February 28, 1931, filed Citation of C. C. A. returnable —— —, ——.

[fol. 3] In United States District Court, Southern District of New York

United States of America, Libellant,

against

British SS. "Sebastopol," Her Engines, Tackle, Apparel and Furniture, etc.

Libel

The libel of information of the United States of America, by its proctor, Charles H. Tuttle, United States Attorney for the Southern District of New York, in a cause of forfeiture, civil and maritime, for breach of the provisions of the Tariff Act of September 21, 1922 and Section 4179 of the Revised Statutes of the United States, upon information and belief, alleges and charges as follows:

First. That at all the times hereinafter mentioned, libellant was and still is a sovereign power.

Second. That the above named SS "Sebastopol" is of British registry.

Third. That on or about August 11, 1927, at a point in the Narrows, New York Harbor, and within the jurisdiction of this Court, officers of the United States Coast Guard seized the British SS. "Sebastopol" for violation of [fol. 4] the laws of the United States, and said vessel has been placed in the custody of the Collector of the Port of New York.

Fourth.—That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Fifth. That on or about the 11th day of August, 1927, a member of the United States Coast Guard, at a point in New York Harbor and within the jurisdiction of this Court,

did demand of the Master of the SS. "Sebastopol," which vessel was then and there bound to the United States and required to make entry, that he produce a manifest for the said vessel, and said Master did deliver to said officer a paper purporting to be the manifest for said vessel, but said Master did fail to produce any proper manifest to said officer upon said demand, and upon examination of the vessel, there was found, on board, certain merchandise, to wit, 4821 cases of Scotch Whiskey and Gin of the appraised domestic value of $152,000 as reported by the office of the Collector of Customs of the Port of New York, which merchandise was not properly included or described in said purported manifest in violation of the Tarriff Act of September 21, 1922.

Sixth. That by reason of the premises and of Sections 431, 581, 583, 584 and 594 of the Tariff Act of 1922, the Master of said SS. "Sebastopol became libel to a penalty of $500 for failure to produce a proper manifest when the same was demanded by the officer of the United States [fol. 5] Coast Guard as aforesaid and to a further penalty of $152,000, being the said appraised domestic value of the merchandise found on board which was not included or described in any proper manifest, and under Section 594 of the Tariff Act of 1922 said SS. "Sebastopol" became and is liable for the above penalties, none of which have been paid.

Wherefore, libellant prays that due process issue in that behalf, as well of attachment to bring said vessel within the jurisdiction of this Court as of monition to all parties in interest to appear upon the return day of such process and duly intervene therein by claim and plea in the premises, and due proceedings being had thereon, that for the causes aforesaid, said vessel be condemned as forfeited to the United States, and the proceeds thereof distributed according to law or that such other disposition be made as the Court shall direct.

Dated, New York, November 18, 1927..

Charles H. Tuttle, United States Attorney for the Southern District of New York, Proctor for Libellant, Office and Post Office Address, U. S. Courts and Post Office Bldg., Borough of Manhattan, City of New York.

[fol. 6] IN UNITED STATES DISTRICT COURT

[Title omitted]

CLAIM

And now Louis Halle, intervening as attorney in fact for the interest of General Import & Export Co., Ltd., of St. Johns, Newfoundland, in the said vessel, the steamship "Sebastopol," appears before this Honorable Court and makes claim to the said vessel, her engines, tackle, apparel, appurtenances and furniture, as the same are attached by the Marshal under the process of this Court, at the instance of the United States of America, and the said Louis Halle avers that, upon information and belief, at the time of the attachment thereof, the corporation above-named was and is the true and bona fide owner of the said vessel, its apparel, tackle, engines, appurtenances and furniture, and that no other person is the lawful owner thereof.

Wherefore he prays that he may be permitted to appear and defend accordingly.

Louis Halle, Proctor for Claimant.

[fol. 7] *Duly sworn to by Louis Halle. Jurat omitted in printing.*

[fol. 8] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER

Now comes the General Import & Export Company, Ltd., of St. Johns, Newfoundland, appearing herein as owners of the above named vessel, and in answer to the libel of information filed by the United States of America against the said vessel, her engines, tackle, apparel, etc., alleges:

First: Admits that the libellant is a sovereign power and that the Steamship "Sebastopol" is of British registry, and that on or about the 11th day of August, 1927, said vessel was seized by officers of the Coast Guard and

thereafter placed in the custody of the Collector of the Port of New York.

Second. Upon information and belief denies that the Master of the above named vessel failed to deliver to the officer demanding the same the manifest of said vessel, and further denies that the said vessel was bound to the United States and required to make entry, and further denies that the merchandise found on board the said vessel was of the domestic value of $152,000 and that the said Steamship [fol. 9] "Sebastopol" became liable to a penalty of $500 for failure to produce a proper manifest, or to any further penalty whatsoever.

Wherefore claimant prays that a decree be entered herein dismissing the libel of information and directing the restoration of the said vessel to the claimant herein.

Louis Halle, Attorney for Claimant, 152 West 42nd Street, New York City.

Duly sworn to by Louis Halle. Jurat omitted in printing.

[fol. 10] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED ANSWER

And now comes the General Import & Export Co., Ltd., of St. Johns, Newfoundland, appearing herein as owner of the above-named vessel, and for its amended answer to the libel of information filed by the United States of America against the said vessel, her engines, tackle, apparel, etc., alleges:

First. Repeats and realleges with the same force and effect as if herein set forth in full allegations "First" and "Second" of the answer herein originally filed.

Second. That on the 11th day of August, 1927, a member of the United States Coast Guard arrested the captain and crew of the British Trawler "Sebastopol," also known as the "Westmoreland," and charged the said defendants

in a complaint duly verified on the 11th day of August, 1927, in which complaint the said member of the Coast Guard, one Karl Schmidt, charged the said captain and crew with a violation of Section 37 of the United States [fol. 11] Criminal Code; the National Prohibition Act of October 28th, 1919; the Tariff Act of September 21st, 1922, a copy of which complaint is hereto annexed.

Third. That on August 31st, 1927, the complaint was dismissed as to all of the defendants except the captain and mate.

Wherefore plaintiff prays that the libel of information herein be dismissed, and a decree be entered directing that the said vessel be returned to the claimant herein.

Louis Halle, Attorney for Claimant. Office and P. O. address: 152 West 42nd Street, Borough of Manhattan, New York City.

[fol. 12] Approved:

Robert B. Watts, Assistant United States Attorney.

Before Honorable Francis A. O'Neill, United States Commissioner for the Southern District of New York

UNITED STATES OF AMERICA, Complainant,

against

DAN MACDONALD, ROBERT BRAGG, PETER POWER, LOUIS Harvey, Benjamin Green, Lewelyn Payne, Dick Cook, J. W. Nicholson, James Hare, Charles Clothier, Reggy Moulton, John Rhymes, Joe Anderson, Robert Mead, John McGrath, Louis Buckland, James Taylor, Defendants.

Violation of Sec. 37, U. S. C. C., National Prohibition Act of Oct. 28, 1919; Tariff Act of Sept. 21, 1922

COMPLAINT

SOUTHERN DISTRICT OF NEW YORK, ss:

Karl Schmidt, being duly sworn, deposes and says that he is a boatswain (T) in the United States Coast Guard Service, appointed by and acting under the authority of the Treasury Department of the United States, and

charged with the duty of enforcing the Act of Congress approved October 28, 1919, commonly known as the National Prohibition Act and the Act of Congress approved September 21, 1922, commonly known as the Tariff Act, [fol. 13] and upon information and belief alleges and charges as follows:

That heretofore, to wit, beginning on or about August 1, 1927, and continuing on each and every day thereafter down to and including August 11, 1927, on board the British Trawler "Sebastopol," also known as the "Westmoreland," at various points on the sea near St. Pierre at Miquelon, and on the sea off the north eastern coast of the United States, and at points in Lower New York Bay, within the jurisdiction of this court, Dan MacDonald, Robert Bragg, Peter Power, Louis Harvey, Benjamin Green, Lewelyn Payne, Dick Cook, J. W. Nicholson, James Hare, Charles Clothier, Reggy Moulton, John Rhymes, Joe Anderson, Robert Mead, John McGrath, Louis Buckland, James Taylor, hereinafter called the defendants, did unlawfully, wilfully and knowingly combine, conspire, confederate and agree together and among themselves and with divers other persons to your deponent unknown, to commit an offense against the United States, that is to say, unlawfully to import and bring into the United States a large quantity of intoxicating liquor, containing more than one-half of one percent of alcohol by volume and fit for use for beverage purposes, aboard and by means of the said British Trawler "Sebastopol," also known as the "Westmoreland," in a manner otherwise than as is authorized by the National Prohibition Act of October 28, 1919, and in violation of the Tariff Act of September 21, 1922.

OVERT ACT

In pursuant to said conspiracy and to effect the objects thereof, the defendants Dan MacDonald, Robert Bragg, [fol. 14] Peter Power, Louis Harvey, Benjamin Green, Lewelyn Payne, Dick Cook, J. W. Nicholson, James Hare, Charles Clothier, Reggy Moulton, John Rhymes, Joe Anderson, Robert Mead, John McGrath, Louis Buckland and James Taylor, did cause the British Trawler "Sebastopol," also known as the "Westmoreland," to enter Lower

New York Bay and to go to a point in the Norrows, between Clifton, Staten Island and Bay Ridge, Brooklyn, within the jurisdiction of this court, on August 11, 1927, with a cargo of upwards of 4900 cases of intoxicating liquor, containing more than one-half of one percent of alcohol by volume and fit for use for beverage purposes; against the peace of the United States in such case made and provided (Section 37, U. S. C. C., National Prohibition Act of October 28, 1919; Tariff Act of September 21, 1922).

The sources of your deponent's information and the grounds for his belief are official investigations made by your deponent in his official capacity on board said British Trawler "Sebastopol," also known as the "Westmoreland," at the time of its seizure on August 11, 1927.

Wherefore your deponent prays that a warrant may issue for the apprehension of the above defendants, that they may be arrested imprisoned or bailed as the case may be.

Karl Schmidt.

Sworn to before me this 11th day of August, 1927.
Francis A. O'Neill, U. S. Commissioner, Southern District of N. Y.

[fol. 15] *Duly sworn to by Louis Halle. Jurat omitted in printing.*

[fol. 16] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

No. 97-98

UNITED STATES OF AMERICA, Libellant,

v.

BRITISH SS. "SEBASTOPOL," Her Engines, Tackle, Apparel and Furniture, etc., Respondent

Before Hon. John M. Woolsey, District Judge

Statement of Evidence

New York, December 19, 1929.

APPEARANCES

Hon. Charles H. Tuttle, U. S. Attorney, Proctor for Libellant; Thomas E. Kerwin, Esq., of Counsel.

Louis Halle, Esq., Proctor for Claimant; Milton R. Kroopf, Esq., of Counsel.

The claims of the libel and answer are stated.

[fol. 17] KARL SCHMIDT, being duly sworn and examined as a witness for the libellant, testifies:

Direct examination.

By Mr. Kerwin:

Q. What is your present occupation, Mr. Schmidt?

A. I am officer in the United States Coast Guard.

Q. And what is your rank?

A. Boatswain.

Q. Were you so occupied during the entire month of August, 1927?

A. I was.

Q. To what boat were you assigned?

A. I was in charge of C. G. 145.

Q. Do you recall the 11th of August, 1927?

A. I do.

Q. Will you tell us what you did that day, please?

A. That day, on that night, I was patrolling the New York Harbor Narrows between Fort Wadsworth and Fort Lafayette. About 2:30 in the morning I sighted a steamer coming in from the sea and she looked kind of suspicious to me and I hailed her by blowing the Klaxon horn, a signal to stop—

Q. Did you say anything when you hailed her?

A. No, the usual way is by blowing a horn or a whistle.

Q. Yes.

A. At that time the Coast Guard flag or pennant was displayed on the "145"; the vessel failed to stop and I fired two shots, blank shots, a signal to stop, and the vessel did stop then. I boarded and I found that the ship had a name on, the "Westmoreland." I went aboard and asked for the master; a man who answered to be the master—I informed him that I was an officer of the United States Coast [fol. 18] Guard and boarding for examination of navigation and customs laws.

Q. Yes?

A. Then I asked him for the ship's manifest.

Q. What did you say to him?

A. I told him that I am an officer of the United States Coast Guard for the examination of navigation and customs laws, and asked him for the ship's documents, to let me see the ship's documents.

Q. Yes?

A. And he gave me a ship's register, and it showed to be the British steam trawler "Sebastopol" of St. Johns, Newfoundland, and the name on the paper and on the ship didn't agree.

Q. Where did you see the name on the ship?

A. On the bow and on the stern; on the stern it said "Westmoreland" of Norfolk, Virginia; and the papers showed she was a Canadian vessel——

The Court: Not Canadian, Newfoundland; it is different.

A. (Continuing:) —and I asked if they had any cargo; he said, "Yes, I have some booze aboard," and I asked if he had a manifest for his booze——

By the Court:

Q. Did he admit he had liquor on board?

A. Yes sir. And he said he had no manifest, so in the meantime the ship was drifting towards the steamer and I told the captain to get under way and get near to the steamer, which he did. Then I told the captain to get the anchor ready, we are going to anchor; he did that and about [fol. 19] at the Bay Ridge Channel bell buoy we anchored, and I informed the captain that he was under arrest for violation of the customs laws.

By Mr. Kerwin:

Q. I show you Government's Exhibit 1 for Identification and ask you if you can point out on that exhibit the exact place at which you first sighted the "Sebastopol"?

Mr. Kroopf: Has Exhibit 1 any notations or marks on it?

Mr. Kerwin: Yes, it has.

Mr. Kroopf: I object to the exhibit.

Mr. Kerwin: It is marked as it should not be. I am going to have him identifiy the markings.

Q. I show you Government's Exhibit 1 for Identification and ask you if you ever saw that before?

A. Yes.

Q. There are certain markings appearing thereon in ink in the part known as the Hudson River and the Upper Bay and the Narrows; did you make any markings on Government's Exhibit 1 for Identification?

A. I did.

Q. Are those markings in ink which I show you—did you make them?

A. I did.

Q. And when did you make them?

A. At the time I seen the "Sebastopol."

Q. The marking here says "Sighted 'Sebastopol' "?

A. That is about off Fort Lafayette.

Q. Did you make that marking?

A. I did.

Q. Is that the point at which you first sighted the "Sebastopol"?

A. That is about it.

[fol. 20] By Mr. Kroopf:

Q. At what point was it—about how far away from shore when you first sighted the "Sebastopol"?

A. A quarter of a mile, possibly.

Q. A quarter of a mile from shore?

A. A quarter of a mile, possibly.

Mr. Kroopf: If that is the case I have no objection to putting it in evidence.

The Court: It is a little better to have him explain.

By Mr. Kerwin:

Q. Explain each of the markings you made on that, please?

A. The black dot is mark, "Sighted 'Sebastopol;' " that is where I saw her, there is plenty of water there, 101 feet or so; she was proceeding into New York Harbor. I started to give signal about breast of Fort Lafayette. Then I fired two shots and when the ship did stop I boarded her; she was at the point marked with a dot and with a notation opposite marked, "Boarded and seized 'Sebastopol' about 2:30 A. M. Latitude 40.37 N.; longitude 42.2

—45 seconds west." While we were there the ship was drifting toward the other ship and I told the master to get under way and he proceeded under my directions to a point marked "Anchored 'Sebastopol,'" where a dot is marked just below the Bay Ridge Channel bell buoy.

Mr. Kerwin: I offer Government's Exhibit 1 for identification in evidence.

No objection.

It is marked Exhibit 1 of this date.

[fol. 21] Q. Did the "Sebastopol" go from the point where you sighted her to the point where she anchored under her own power?

A. She did.

Q. Did you have any other conversation with anyone on the boat?

A. No, not that time.

The certificate of British registry is marked Exhibit 2 for Identification. Agreement and account of crew is marked Exhibit 3 for Identification. The manifest is marked Exhibit 4 for Identification.

By Mr. Kerwin:

Q. I now show you Government's Exhibits 2, 3 and 4 for Identification and ask you if you ever saw Government's Exhibit 4 for Identification before, and also if you ever saw the original, of which Government's Exhibits 2 and 3 for Identification are photostats, before?

A. Yes. This I found in the cabin of the captain of the "Sebastopol."

Q. Is that Exhibit 4?

A. Yes. And this is a copy of the certificate of registry of the "Sebastopol."

Q. Where did you find that?

A. The captain gave it to me. And here is the agreement of the crew of the "Sebastopol." I found that in the cabin of the captain of the "Sebastopol."

Q. Do you remember the name of the captain?

A. I think it was Donald McDonald.

Mr. Kerwin: I now offer Exhibits 2, 3 and 4 for Identification, in evidence.

No objection.

[fol. 22] They are marked in evidence Exhibits 2, 3 and 4 of this date.

The name plate "Westmoreland" is marked Exhibit 5 for Identification. "Sebastopol" name plate is marked Exhibit 6; on the back it is "Mary Emily." Name plate "Mary Emily" is marked Exhibit 7 and another "Westmoreland" plate is marked Exhibit 8.

Q. I now show you Government's Exhibits 5, 6, 7 and 8 for Identification, Government's Exhibit 5 bearing the name "Westmoreland," Government's Exhibit 6 bearing the name "Sebastopol" on one side and the name "Mary Emily" on the reverse side; Government's Exhibit 7 bearing the name "Mary Emily," and Government's Exhibit 8 bearing the name "Westmoreland," and ask you if you ever saw those before?

Mr. Kroopf: I object to the admission of them in evidence on the ground that it is irrelevant.

The Court: I don't know, I think if you discover those things on board, the change of names and so forth, I think it may be material to the fact that she was engaged in this trade; I will let them in.

Mr. Kroopf: Engaged in the trade——

The Court: Engaged in intending to smuggle.

A. Yes, I saw them.

[fol. 23] Q. Will you tell me where you saw them?

A. I saw No. 5 on the bow of the "Westmoreland" or the "Sebastopol" at the time I seen her; I can't tell you exactly which bow it was, they were alike on either bow.

Q. This one is No. 6?

A. That was on the "Sebastopol" in the mate's room.

Q. This is No. 7?

A. That was in the mate's room on the "Sebastopol."

Q. And this is No. 8?

A. And that was on the bow of the "Sebastopol."

Mr. Kerwin: I will now offer them in evidence.

Same objection, ruling and exception.

They are marked Exhibits 5, 6, 7 and 8 in evidence of this date.

Exhibits 9, 10 and 11 are also name plates.

Q. I show you Exhibit 9, name plate for Westmoreland, Norfolk, Virginia, No. 10 for Identification bearing the name Mary Emily, St. Johns, N. F., Government's Exhibit 11 for Identification bearing the name Sebastopol, St. Johns, N. F., and ask you if you ever saw those before?

A. Yes, I did see them; this here, No. 9 was on the stern of the "Sebastopol" at the time she was seized.

Q. Now, No. 10?

A. No. 10 was in the mate's room on the "Sebastopol".

Q. No. 11?

A. It was also in the mate's room on the "Sebastopol".

Q. Did you have any conversation with the captain con- [fol. 24] cerning these plates?

A. Not at the time of the seizure.

Q. Did you have any conversation with the captain after the seizure?

A. Not personally, no; I was——

Mr. Kerwin: I offer the Govenment's Exhibits for Identification 9, 10 and 11, in evidence.

Same objection, ruling and exception.

By the Court:

Q. Did you have any conversation with anyone about these name plates?

A. Not at that time, no, sir.

By Mr. Kerwin:

Q. Did you have any conversation with anyone about you left the boat concerning the name plates?

A. No; I took the master and put him on the "145" at the time I arrested him.

Q. Now, did you turn the boat and its cargo over to the Customs?

A. Yes, sir.

Q. Did you see the man sitting in the back of the room that you delivered it to?

A. Yes.

Q. Did you take samples of the cargo?

A. I did.

Mr. Kroopf: I will concede that the cargo contained intoxicating liquor very much fit for beverage purposes.

And I will concede that this bottle was part of the cargo of the vessel that was found on board on the date of the seizure (refering to a bottle brought in by counsel).

[fol. 25] It is conceded by counsel that Government's Exhibits 12, 13, 14 and 15 for Identification are samples of the cargo taken from the "Sebastopol" or "Westmoreland" on the date of its seizure, on the 11th of August, 1927, and that said samples were taken by Mr. Schmidt and delivered to the United States chemist and that the United States chemist would testify that he analyzed each of said samples and found them to contain more than one-half of one per cent of alcohol by volume and to be fit for use for beverage purposes.

Mr. Koopf: Yes, that is conceded.

Mr. Berwin: I now offer them in evidence.

They are marked Exhibits 12, 13, 14 and 15 of this date.

Q. Are you familiar, Mr. Schmidt, with the usual method of entrance to the harbor of New York?

A. Yes, I am.

Q. Was this vessel on the usual course?

A. No.

Q. How far off the usual course was it?

A. Approximately a mile; I would say; it might be a little less.

By the Court:

Q. Was she to the eastward of the regular course?

A. Yes, sir, to the east.

Q. What is the implication of that?

A. It showed that she didn't intend to stop at Quarantine and pass in the usual manner.

[fol. 26] Q. How could she come in without passing Quarantine?

A. What I mean by passing, she didn't intend to stop at Quarantine and allow the officer to come aboard and examine her.

Q. How far would she have to pass Quarantine?

A. She would have to stop.

Q. But if she kept on the course she was on when you saw her how far off from Quarantine would she pass?

A. About three-quarters to a mile.

Q. To the eastward of it?

A. Yes, sir, by a rough guess.

Cross-examined by Mr. Kroopf:

Q. On the night or the early morning of August 11, 1927, when you first sighted the "Sebastopol" you stated that she looked suspicious; am I correct in that?

A. Right.

Q. Now, was that suspicion aroused because she was off her course laying eastwardly of the regular course, or the usual course?

A. Partly.

Q. What was the other part of that suspicion?

A. The painting of the ship.

Q. Did you have any suspicion that the vessel was laden with a cargo of liquor?

A. No, not exactly liquor, no.

By the Court:

Q. What do you mean by the painting of the ship?

A. As far as I can remember, I never saw an American trawler painted with red and white; they are painted dark; this had white paint, on deck house, and I never saw an American vessel painted that way, and another thing the [fol. 27] name plates were apparently newly painted, which the searchlight showed, and that they had been re-attached to her.

By Mr. Kroopf:

Q. Are these the name plates that you thought were newly painted (indicating them)?

A. Yes.

Q. And the rest of the ship looked——

A. Looked weather-worn.

Q. You personally went on board the vessel?

A. I did.

Q. And you spoke to the captain?

A. I did.

Q. And did you immediately call for the captain, or did you go over and see him?

A. The first thing I saw some member of the crew, I don't know who, and I asked him for the master and he said the master——

Q. Did you see anything wrong before you spoke to the captain?

A. What do you mean by anything wrong?

Q. Did you see anything that made you think there was a liquor violation on board that vessel?

A. I did.

Q. And what made you see that?

A. There was a case of liquor in the pilot house open, with some bottles in it.

Q. And so immediately upon your boarding the ship you were quite certain that the vessel had been transporting liquor?

A. No, I was not certain.

Q. Well, you saw liquor, you say?

A. I saw liquor, yes.

Q. And you were suspicious that it was transporting liquor when you saw that?

A. Yes.

[fol. 28] Q. You knew the vessel was in the territorial waters of the United States, that is, within the three-mile limit?

A. Yes, I did.

Q. And you also knew that the vessel was in motion, you saw it in motion?

A. Yes.

Q. And when you boarded it you saw this case of whiskey of whatever liquor there was in it, intoxicating liquor?

A. Yes, I did.

Q. Now, you come to the point of speaking to the captain; did you see him after that?

A. After what?

Q. After seeing this case of whiskey?

A. I saw him at the same time as I saw the case, and I saw some other members of the crew.

Q. Then you started a conversation with the captain?

A. Yes.

Q. What was that conversation, as well as you can recall?

A. The conversation in part was I informed the captain that I was an officer of the United States Coast Guard——

Q. He could see that, couldn't he?

A. Well, I don't know about his eyesight; maybe he had bad eyesight.

Q. Go ahead.

A. And I told him I was off the United States Coast Guard, boarding for the purpose of examination of customs and navigation laws.

Q. What did he say?

A. He said, "I know it."

Q. And what did you say?

A. I asked him for the ship's documents.

Q. And he gave you the ship's registry?

A. He did.

Q. That is a ship's document, isn't it?

A. It is one of them.

Q. Then you proceeded to the hatches to see what her cargo consisted of?

A. No.

[fol. 29] Q. What did you do then?

A. Then I asked the captain if he had any cargo with him.

Q. What did he say?

A. He said yes, he had some booze aboard.

Q. And up to that moment you hadn't asked him for the manifest?

A. I couldn't ask for the manifest unless I knew he had some cargo.

Mr. K-oopf: I ask that it be stricken out.

Q. Up to that moment you hadn't asked for the manifest?

A. No.

The Court: He said he couldn't ask for the manifest unless he knew she had cargo on board.

By the Court:

Q. You asked him for the manifest after that?

A. Yes, sir; after he informed me that he had a cargo I asked him for the manifest then.

Q. What did he give you?

A. He said he didn't have a manifest.

Q. What is that French paper there?

A. I found that in the captain's room.

The Court: Let me see that, that French paper. It is handed to the Court.

By Mr. Kroopf:

Q. Did you sign or swear to a complaint against the members of the crew of this vessel?

Mr. Kerwin: I object to that; it doesn't seem to me material to the issues here.

[fol. 30] The Court: It might be if the crew were acquitted or the master was acquitted, I don't know.

Mr. Kerwin: Well, I will withdraw my objection.

Q. Did you swear to a complaint against these defendants?

A. I did.

Q. Do you recall what you charged them with?

A. No, I don't remember; it is quite a long time ago.

Q. Did you charge them with a violation of the National Prohibition Act?

A. I don't remember now what the charge was; I know I swore to some complaint.

Q. Does this refresh your recollection that you charged them with a violation of the Prohibition Act?

A. Yes, that is right.

Q. Do you know what happened to that case?

A. No.

Q. You never testified concerning it before the Grand Jury?

A. Yes, before the Grand Jury.

Q. You did, before the Grand Jury?

A. Yes.

Q. And you never testified concerning it before any court?

A. No.

Michael F. Sweeney, being duly sworn and examined as a witness for the libellant, testifies:

Direct examination.

By Mr. Kerwin:

Q. What is your occupation?

A. Customs inspector.

[fol. 31] Q. Were you so engaged during the entire month of August, 1927?

A. Yes, sir.

Q. Did you go on board the "Sebastopol" during that month?

A. I did, sir.

Q. Do you recall the date?

A. Around the 12th of the month, the morning of the 12th.

Q. Did you receive a cargo from Mr. Schmidt who has just testified?

A. He was on board the boat, yes, sir.

Q. Did you make an inventory of the cargo of the "Sebastopol" at that time?

A. I did.

Q. Will you state what was the result of that inventory?

A. It consisted of 4841 cases.

Q. Of what?

A. Marked Scotch liquor, Perfection Brand.

Q. And you took that liquor over to the customs?

A. Yes, sir; I transferred it to the seizure room in the Army Base. It was a peculiar signature for it.

The Court: The Army Base is in Brooklyn?

The Witness: Yes, sir, 58th Street.

It is conceded by counsel that the foreign value of the cargo may be computed at the rate of ten dollars per case.

The Court: Foreign value?

Mr. Kerwin: Yes.

Mr. Kroopf: We hope there is no domestic value.

The Court: Did they appraise the value of the ship?

Mr. Kerwin: It was appraised under court order at $7,500.

Mr. Kerwin: I am going to ask to amend the libel to [fol. 32] change paragraph 6 from reading $150,000, I believe it was formerly—from $152,000—and ask that a penalty in the sum of $48,410 be fixed.

The Court: The libel is amended to read 4841 cases of Scotch whiskey and gin from the appraised foreign value of $48,410 as recorded by the Collector of Customs; it is agreed to by counsel for claimant.

The way I have it marked on the margin is "Mem. December 19, 1929" and I have signed my name and I say 4841 cases of Scotch whiskey and gin at the rate of $48,410 as agreed by counsel for claimant, which merchandise was not

properly included in the inventory. And in the next paragraph a penalty of $48,410, being the agreed foreign value of the merchandise found on board which was not included in the manifest.

Libellant rests.

MOTION TO DISMISS

Mr. Kroopf: I rest for the claimant, and I move to dismiss the libel on the ground that the Government's case as made out fails to show a violation of the statute under which the libel has been instituted. Under Sec. 584 a vessel bound to the United States——

The Court: Mr. Kroopf, of counsel for the claimant, moves to amend the answer to include allegations of the arrest of the members of the crew and the captain and of the complaint filed by the arresting officer charging them with conspiracy to violate the National Prohibition Act and [fol. 33] to annex a certified copy. Leave is granted to amend the answer and the Government may have leave to reply as it sees fit to such an amended answer. The purpose of these further steps is to enable the claimant distinctly to raise the question of the election by the Government as a matter of fact to proceed under the Prohibition Act and also the question of whether as a matter of law under Sec. 29 of the Prohibition Act the Government is not compelled to proceed under that Act.

IN UNITED STATES DISTRICT COURT

OPINION

RE "RUTH MILDRED"

WOOLSEY, District Judge:

These libels are dismissed, without costs.

I. The "Sebastopol" a trawler, of St. Johns, Newfoundland, was seized by Coast Guard Officers of Coast Guard vessel No. 145, on August 11, 1927, in the Narrows, between the Upper and Lower New York Bays, at about 2:30

a. m. whilst masquerading under the name of the "Westmoreland," of Norfolk.

When the "Sebastopol" was boarded, a man named Donald McDonald, representing himself as her master, produced her register, which gave her true name and home port as above, and, on being asked if he had cargo, admitted that he had a liquor cargo, which turned out, on examina-
[fol. 34] tion, to contain 4,841 cases of Scotch whisky. She was then on a course that would take her as far as possible from Quarantine. Thus apparently she hoped to avoid detection and get up to New York City.

The painting of her name plates and the appearance of their having been newly attached attracted the attention of the Coast Guards when they turned the searchlights of the No. 145 on her.

When she was boarded, an open case of liquor was found in the pilot house. The ship's documents, some of which were discovered only after considerable search, consisted of her registry as above, an agreement and account with her crew, and a manifest which was false, in that it did not list the liquor cargo.

A variety of name plates were also found aboard, so she was prepared for almost Protean transformations. She might be, at will, the "Sebastopol" of St. Johns, Newfoundland, the "May Emily" of St. Johns, Newfoundland, or the "Westmoreland," of Norfolk. Va.

The "Sebastobal" and her cargo of liquor, samples of which marked in evidence showed an illegal alcoholic content, were turned over to the Customs. Her master and crew were charged in a complaint before a United States commissioner with violation of the National Prohibition Act.

By agreement, the foreign value of the cargo of Scotch whisky is fixed at $10 per case, making its total value $48,-410. The vessel was appraised at $7,500.

[fol. 35] A stipulation for value in this sum following the usual form, has been filed, and the vessel has gone on her way.

II. The vessel in the second case is the auxiliary schooner "Ruth Mildred." She is a vessel of the United States licensed from Gloucester, Mass., to engage in the cod and mackerel fisheries. She is 82 feet in length, 21.5 in depth, and her official number is 222,218.

Shortly after midnight on March 1, 1928, the United States Coast Guard vessel, No. 148, in charge of Coast Guard Officer George Watson, since deceased, was patrolling the eastern entrance of Long Island Sound. Whilst the No. 148 was in the vicinity of Race Rock, off the coast near New London, Conn., she observed the "Ruth Mildred" proceeding under power to the westward. On being hailed, her master said she was bound for New York.

Although the visibility was good and the wind moderate, the sea was so rough as to make it impossible to board the schooner in the darkness. Accordingly, Watson, the captain of the No. 148, knowing that the "Ruth Mildred" was under suspicion, sent a wireless message to the patrol office of his service on Block Island, and was instructed by those there in charge to trail the schooner and watch her discharge.

Through the night the vessels proceeded—practically in company—westward through Long Island Sound, finally arriving in the latter part of the morning at the foot of Fulton Street, East River, New York City, where the [fol. 36] "Ruth Mildred" tied up at a wharf. The members of her crew were already on deck, and at once piled ashore. A few minutes later the Coast Guard vessel No. 148 came alongside. By that time the whole crew of the "Ruth Mildred" had disappeared.

About 11:15 a. m. the captain of the No. 148 and some of his crew went on board the schooner and found that even her captain had left her.

About 1 p. m. the captain of the "Ruth Mildred," who turned out to be Nils Soderberg, her owner and the claimant in this suit, came on board and showed his documents to the captain of the No. 148.

In pursuance of his instructions, the captain of the No. 148 stated that he would remain alongside the "Ruth Mildred" until her cargo was unloaded. When he made this intention known to the captain of the "Ruth Mildred," the latter said: "You have got a rummy this time," and, "if that is the case I might as well tell you the truth. You have a good catch here. I am loaded up to the gills with liquor," which was a most felicitous metaphor, because his liquor cargo was hidden beneath a convenient veneer of fresh fish.

Subsequently when asked how much liquor he had on board, the captain of the "Ruth Mildred," though admitting

she was fully loaded, did not state the amount of his cargo. When asked where he got the liquor, he said that he had secured it in the vicinity of "Georges Banks"—probably St. George's Banks—which are fishing banks about one hundred miles east of Cape Cod.

In view of this admission, the "Ruth Mildred" was seized, and subsequently a search was made.

[fol. 37] On board her were found 220 boxes and 170 bags of rye whisky and other alcoholic liquor, of a potable quality, containing in excess of the legal one-half of 1 per cent of alcohol by volume.

The estimated foreign value of this liquor was $27,800 and the estimated value here was $62,400.

On April 2, 1928, a libel was filed against the "Ruth Mildred" to enforce penalties and forfeiture against her on the ground that she had become subject to forfeiture under Section 4377 of the U. S. Revised Statutes (title 46, U. S. Code, § 325 [46 U. S. C. A. § 325]), because she had violated the terms of her license, in that she had been found engaged in transporting intoxicating liquors within the territorial waters of the United States when she was licensed only to engage in the cod and mackerel fisheries.

The "Ruth Mildred" was duly appraised at $10,000, and was later released on the filing of a claim and answer by Nils Soderberg, the owner, and a stipulation for her full appraised value in the sum of $10,000.

III. The case of the Ruth Mildred differs from the case of the Sebastopol in two respects only: First, in the fact that it is contended that search and seizure of the "Ruth Mildred" was illegal, as not being founded on reasonable grounds; and, second, in that she is a vessel of the United States, and the statute invoked for her forfeiture is a statute, title 46, U. S. Code, § 325 (46 U. S. C. A. § 325), applying to vessels registered, enrolled, or licensed in the United States requiring them to confine themselves to the trade for which they are licensed.

[fol. 38] Whilst these cases were not tried together, they are submitted together, and a single opinion will serve for the disposal of both.

IV. Before proceeding to the main question, there are some futile contentions made by both the parties which have to be met and put aside.

These contentions and my comments thereon are as follows:

[1] A. The claimant of the "Ruth Mildred" contends that there was an illegal search and seizure in that case.

I hold that the seizure of the "Ruth Mildred" was justified. There was not any search, legal or illegal, if one uses that word to mean an act precedent to, and resulting in, a seizure.

A search was forestalled by the confession of her captain, above noted, that the "Ruth Mildred" was a rum runner. Such a confession justified the seizure and made a search unnecessary just as a plea of guilty justifies a sentence and makes a trial unnecessary.

The reason for this is, of course, that, by his confession, the suspect and, by his plea of guilty, the prisoner, definitely elects not to stand on his constitutional rights, and so expressly waives them.

Surely after such a confession as was here made the most enthusiastic champion of the Bill of Rights would not seriously contend that a government officer engaged in law enforcement should at once withdraw on constitutional grounds and seek a search warrant from the nearest United States commissioner. As Judge Coleman aptly [fol. 39] remarked in another connection where a claim of illegal search had been put forward, that "Common sense is not barred by the Fourth and Fifth Amendments." In re Kips Bay Brewing & Malting Co. (D. C.) 29 F. (2d) 836, 837.

B. The government contends, with what relevancy does not clearly appear to me, that I should take into consideration in dealing with these cases that executive elemency is often extended to innocent victims of forfeiture.

The consideration was urged in the government's brief before the Circuit Court of Appeals for the Fourth Circuit in the case of The Pilot, 43 F. (2d) 491, and was mentioned by Judge Northcott in his opinion at page 493.

My answer to this contention does not interest me, because I am dealing with rights under the law and not with possible clemencies.

[2] C. The government also contends that, by filing stipulation for value, the claimant waived the right to contend that the libels are brought under the wrong statutes.

My answer to that contention is that, if the owner of property proceeded against in rem files a stipulation for value under the common practice here or a bond for double the amount of the libelant's claim under title 28, U. S. Code, § 754 (28 U. S. C. A. § 754), or Section 26 of title 2 of the National Prohibition Act (27 U. S. C. A. § 40), he does not waive any defense which may be available to him. Chief Justice Waite, sitting here on Circuit, said in The [fol. 40] Fidelity, 16 Blatchf. 569, 8 Fed. Cas. 1189, at page 1192, No. 4758:

"The stipulation filed to obtain the release of the tug is not a waiver of the question as to the original liability of the tug. The stipulation takes the place of the vessel, and, for all the purposes of the trial, the case goes on as if the vesssel were itself in court."

To the same effect also are The Monte A (D. C.) 12 F. 331, 335; The Berkeley (D. C.) 58 F. 920, 922, 923; The Lisbon, 3 F. (2d) 408, 409 (C. C. A. 9).

[3, 4] V. After the "Sebastopol" was tried before me in December, 1929, and whilst it was under advisement, I was requested by both parties to hold up my decision pending a decision by the Supreme Court in the case of Richbourg Motor Co. v. U. S. and Davies Motor Co., Inc. v. U. S. hereafter referred to as the Richbourg Case, which was then awaiting argument in the Supreme Court on the ground that the decisions in those cases would probably control these cases.

These decisions went against the government, Richbourg Motor Co. v. U. S., 281 U. S. 528, 50 S. Ct. 385, 74 L. Ed. 1016, and now the government contends that they do not govern my decision in these cases, whilst the counsel for the steamship adhers to his original position that they do.

VI. The only difference between the Richbourg Case and these two cases is that in the Richbourg Case the forfeiture of the automobile involved was sought under Revised [fol. 41] Statutes, § 3450, now title 26, U. S. Code, § 1181 (26 U. S. C. A. § 1181), whilst here the penalties in the "Sebastopol" Case and the forfeiture in the case of the "Ruth Mildred" are sought under other provisions of the statutes.

The basis of the libel against the "Sebastopol" is Section 584 of the Tariff Act of 1922 (title 19, U. S. Code, § 486 [19 U. S. C. A. 486]), dealing with the falsity or lack of manifests on vessels, and prescribing penalties to the amount of the value of the merchandise if it be not manifested. Section 594 of the said Tariff Act (title 19, U. S. Code, § 498 [19 U. S. C. A. § 498]), prescribes the method of collection of the penalities by holding the vessel as security.

Section 498 of title 19, U. S. Code (19 U. S. C. A. § 498), reads as follows:

"Whenever a vessel or vehicle, or the owner or master, conductor, driver, or other person in charge thereof, has become subject to a penalty for violation of the customs-revenue laws of the United States, such vessel or vehicle shall be held for the payment of such penalty and may be seized and proceeded against summarily by libel to recover the same."

The "Sebastopol", therefore, was in effect surety for her master's payment of the penalties incurred by false manifest, and, as such, she was libeled, and thereafter, as above mentioned, a stipulation in the usual form for her full agreed value was filed.

Forfeiture of the "Ruth Mildred" is sought under Revised Statutes, § 4377, which stems back to the Act of Feb. 18, 1793, c. 8, § 32, and is now Section 325 of title 46 of the [fol. 42] United States Code (46 U. S. C. A. § 325). That section provides:

"Penalty for Violation of License.—Whenever any licensed vessel is transferred, in whole or in part, to any person who is not at the time of such transfer a citizen of and resident within the United States, or is employed in any other trade than that for which she is licensed, or is found with a forged or altered license, or one granted for any other vessel, such vessel with her tackle, apparel, and furniture, and the cargo, found on board her, shall be forfeited. But vessels which may be licensed for the mackerel fishery shall not incur such forfeiture by engaging in catching cod or fish of any other description whatever."

Section 26 of title 2 of the National Prohibition Act (title 27, U. S. Code, § 40 [27 U. S. C. A. § 40]), is the act under

which the respective claimants contend their vessels should have been libeled.

That section reads as follows:

"Unlawful Transportation of Liquor; Seizure and Destruction of Liquor and Sale of Vehicle.—When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, [fol. 43] or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this chapter in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft,

or automobile, the taking of the same, with a description [fol. 44] thereof, shall be advertised in some newspaper published in the city or county where taken or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts."

VII. Whether Section 26 of title 2 of the National Prohibition Act is the paramount provision of law when it is the alternative basis of a forfeiture to one of the two other statutes above quoted is the subject of my inquiry here.

The question is as to the applicability of one law or another to a given set of circumstances, and involves, therefore, the form of a punitive remedy rather than any matter of substantive law.

There is not any decision of the Supreme Court which deals with these precise statutes, but there are two indications of what its expectable attitude would be on the principles involved.

The first is in a concurring opinion by Mr. Justice Butler, concurred in by Mr. Justice Stone, in Port Gardner Co. v. United States, 272 U. S. 564, 567, 47 S. Ct. 165, 71 L. Ed. 412, and the second in Richbourg Motor Co. v. United States, 281 U. S. 529, 50 S. Ct. 385, 74 L. Ed. 1016, a case where the facts so differed from Port Gardner Case as to enable the dissentients in the earlier case to find a text for their views.

[fol. 45] Mr. Justice Butler, dissenting, in the Port Gardner Case, 272 U. S. 564, said at page 567, 47 S. Ct. 165, 166, 71 L. Ed. 412 (italics mine):

"But it leaves open the question which is not decided in No. 115 [U. S. v. One Ford Coupe Automobile] 272 U. S. 321, 47 S. Ct. 154, 71 L. Ed. 279 [47 A. L. R. 1025]. The substance of that question is whether the prohibition officer, discovering one in the act of transportation, may disregard the plain and direct commands of Section 26 to proceed against the vehicle as there directed. *I think he has*

no more right to ignore that command than he has to let the liquor and offender go. The law makes the election. I regret that this court's answer is so qualified and restricted. Section 26 is not so restrained."

In Richbourg Motor Co. v. United States and Davies Motors, Inc. v. United States, 281 U. S. 528, 50 S. Ct. 385, 74 L. Ed. 1016, automobiles had been seized for the unlawful transportation of intoxicating liquor. The government sought forfeiture of the automobiles under title 26, U. S. Code, § 1181 (26 U. S. C. A. § 1181), formerly Revised Statutes, § 3450, which authorizes forfeiture of vehicles used in the removal or concealment of any commodity with intent to deprive the United States of a tax due thereon.

Two District Court had allowed the forfeitures, and the Circuit Court of Appeals for the Fourth and Ninth Circuits [34 F. (2d) 38; 35 F. (2d) 928], had affirmed the courts below.

On certiorari, the Supreme Court reversed both decisions, and said, through Mr. Justice Stone, at page 535 of 281 U. S., 50 S. Ct. 385, 388:

[fol. 46] "The objective of title 2, § 26, is not the prosecution of the offender, elsewhere provided for, but the confiscation of the seized liquor and the forfeiture of vehicles used in its transportation, to the limited extent specified in the section. Every act which it enjoins on public officials is directed to that end.

"In providing for forfeitures under this section Congress was not unaware that the enactment of the National Prohibition Act would enormously increase seizures of vehicles, beyond those made under Section 3450 (26 U. S. C. A. § 1181), and that their forfeiture would place an increased and heavy burden on many innocent persons, unless afforded some protection by the new legislation. By title 2, § 26 (27 U. S. C. A. § 40), it gave such protection in all cases where the prosecution of the person guilty of the transportation is had under the National Prohibition Act. This would have been but an idle gesture, and the congressional purpose would have been defeated if, in practically every case where the transporting vehicle is seized, the prosecuting officers could compel forfeiture of the interests of innocent third persons under section 3450 (26

U. S. C. A. § 1181). Yet that is the effect of the construction of title 2, § 26, contended for by the government, since, with the enactment of national prohibition, there can be few cases of illegal transportation which do not involve the concealment of non-tax-paid liquor. See United States v. One Ford Coupe, page 326 of 272 U. S., 47 S. Ct. 154, 71 L. Ed. 279, 47 A. L. R. 1025.

"We think that Congress did not take the precaution to enact the carefully chosen language of Section 26 [fol. 47] merely to impose general duties on prosecuting officers already placed on them by other sections of the act, but that its purpose was to preclude the nullification of the protection which Section 26 had extended to innocent third persons.

"This Court has already held that the provision in Section 26 that 'the court upon the conviction of the person so arrested shall * * * order a sale by public auction of the property seized' is mandatory and requires the forfeiture to proceed under that section. Port Gardner Investment Co. v. United States, supra [272 U. S. 564, 47 S. Ct. 165, 71 L. Ed. 412]; Commercial Credit Co. v. United States, supra [276 U. S. 226, 48 S. Ct. 232, 72 L. Ed. 541]. No tenable ground of distinction is suggested which would enable us to say, where forfeiture is involved that the preceding requirement of the section, that the proceedings against the person arrested 'shall be under the provisions of this title', is any less so."

Then, after dealing with the legislative history of Section 26 of title 2 of the National Prohibition Law, Mr. Justice Stone summarizes the decision of the court thus at page 36 of 281 U. S., 50 S. Ct. 385, 388:

"We are of opinion that under title 2, § 26 (27 U. S. C. A. § 40), it is the duty of prohibition officers to arrest any person discovered in the act of transportation and to seize the transporting vehicle; that such arrest and seizure require the government to proceed for forfeiture of the vehicle under title 2, § 26. It is unnecessary to say whether, if for any reason the seizure cannot be made or the forfei- [fol. 48] ture proceeded with, prosecution for any offense committed must be had under the National Prohibition Act rather than other statutory provisions."

VIII. When a vessel of such comparatively small value as the "Sebastopol" is transporting a cargo of large value, its seizure for the enforcement of penalties provided by Section 584 of the Tariff Act of 1922 results in the loss of the vessel to her owner—as devastating to an owner as a forfeiture, even if not so-called—and equally unfair, if that owner be innocent.

So the fact that, as is agreed by the government, the "Sebastopol" libel is for a penalty instead of a forfeiture, makes no difference to me, unless I am willing to "stick in the bark"—a surface operation which I always try to avoid.

Consequently, the "Sebastopol" case must follow the principle of the Richbourg Case, unless the fact that the Tariff Act was passed subsequently to the National Prohibition Act makes a difference in the situation.

On September 19, 1930, subsequently to the decision of the Richbourg Case, the Circuit Court of Appeals for the Fourth Circuit in The Pilot, 43 F. (2d) 491, held at page 493 that the Tariff Act of 1922 is not "controlled" by the Prohibition Act of 1919, and reversed a decision dismissing a libel brought for customs penalties under Sections 584 and 594 of the Tariff Act of 1922 against a vessel caught within the three-mile limit carrying a cargo of liquor.

No one could properly claim that the Tariff Act, §§ 584 and 594, repealed, by implication, Section 26 of title 2 of [fol. 49] the National Prohibition Act providing forfeiture of the vehicle in any case where liquor was found being transported and as, therefore, Section 26 of title 2 of the Prohibition Act is still in full force, we have that section making it a duty, when liquors of unlawful alcoholic content are found being transported within the territory of the United States, to proceed against the carrying vessel or vehicle in a special manner by steps which are detailed in that section.

Naturally, the Tariff Act covers different offenses from those dealt with by the Prohibition Act. I think that Sections 584 and 594 of the Tariff Act of 1922 are partly extraterritorial in their ambit, for those sections fall within the category of protective measures which may be exercised outside of the three-mile belt of waters which constitute our marginal sea. Cf. Tariff Act of 1922, § 581

(title 19, U. S. Code, § 481 [19 U. S. C. A. § 481]; The Mistinguette (D. C.) 14 F. (2d) 753; and United States v. Bengochea, 279 F. 537 (C. C. A. 5).

Section 26 of title 2 of the National Prohibition Act is, however, purely territorial in its ambit, and illegal transportation of liquor would not be possible outside the marginal sea. Cunard Co. v. Mellon, 262 U. S. 100, 43 S. Ct. 504, 67 L. Ed. 894, 27 A. L. R. 1306.

The two acts overlap, consequently, within the outer limits of the marginal sea of the United States, and within such limits, by its direct and specific terms as interpreted by the Supreme Court, Section 26 of title 2 of the National Prohibition Act is the paramount statute.

[fol. 50] Consequently, if the "Sebastopol" had been captured outside the three-mile limit, this libel would have to be sustained, for the only offense then chargeable would have been a false manifest.

But, as she was seized within the three-mile limit, she was guilty, not only of false manifesting, but of transportation of intoxicating liquor. The reason for the first-mentioned offense was to cloak the second.

The purpose of the government is to punish the vessel for the second offense by invoking against her the penalties of the first, which is more easily proved, perhaps, because it does not require, as a condition precedent to its success, the conviction of the person in possession of the vessel, and, in any event, carries under the name of penalty a punishment as drastic against the owner of a small ship, guilty or innocent, as Section 26 carries against the guilty only. Cf. The Pesaquid (D. C.) 11 F. (2d) 308.

The case of United States v. The Brig Malek Adhel (Harmony v. U. S.), 2 How. 210, 233, 11 L. Ed. 239, in which the master turned pirate, is the classic case of the forfeiture of a vessel when its owner was obviously innocent of the offense for which it was forfeited. From the date of that case until the enactment of Section 26 of title 2 of the National Prohibition Act, so far as I am aware, all forefeiture statutes cut off innocent owners of and lienholders on the vessel from assertion of their claims. Cf. The Pilot (C. C. A.) 43 F. (2d) 491, 493.

As Mr. Justice Stone pointed out in the quotation above given from the Richbourg Case, Section 26 was aimed at remedying this injustice.
[fol. 51] The government should, I think, in view of the oft-repeated homilies of our criminal law, be astute to save the innocent from injury.

IX. In the case of the "Ruth Mildred", which involves the control by our government of its domestic vessels, the libel is for a forfeiture brought under title 46, U. S. Code, § 325 (46 U. S. C. A. § 325), for breach of her license as a fishing vessel. That statute does not recognize innocent owners or lienors.

If it be objected that the master of the "Ruth Mildred" is her owner, and confessedly is not innocent, my answer is that we do not know what innocent persons may have liens by way of mortgage or otherwise on her, and that a wrong remedy should not be allowed to be maintained merely because her owner may be guilty.

[5-7] X. In situations such as we have here, where proceedings in rem against vessels are involved, if their owners come into court as claimants thereto, they come in as actors in the proceeding, for they are in effect petitioners asking for a favor—to have their ships returned to them. United States v. 422 Casks of Wine, 1 Pet. 547, 549, 550, 7 L. Ed. 257. On such a petition the burden is on them to show their ownership, their present right to possession of the vessel, The R. W. Skillinger, 1 Flip. 436, 21 Fed. Cas. 102, 103, No. 12,181, and, in the case of a forfeiture proceeding under section 26 of title 2 of the National Prohibition Act, their innocence of complicity in the acts for [fol. 52] which the forfeiture is sought. Cf. United States v. One Hundred and Twenty-Nine Packages, 27 Fed. Cas. 284, 285, 286, No. 15,941.

[8] At this point in any case in rem issue may be joined under a practice long familiar to determine the claimant's locus standi. United States v. 422 Casks of Wine, 1 Pet. 547, 549, 550, 7 L. Ed. 257; The Two Marys (D. C.) 10 F. 919, 920, 928; The Steamer Spark v. Lee Choi Chum, 1 Sawy. 718, 22 Fed. Cas. 871, 873, No. 13,206; The Prindiville, 1 Brown's Adm. 487, 19 Fed. Cas. 1345, 1346, No.

11,435; United States v. One Hundred Barrels of Cement, 27 Fed. Cas. 292, 293, No. 15,945.

If issue were so joined, for example, in a libel for forfeiture against the Ruth Mildred under section 26 of title 2 of the National Prohibition Act, it is obvious that her owner could not show his innocence—and, unless an innocent lienor turned up, the libel for forfeiture would go by default.

XI. It is clear that in both these cases the breach of the National Prohibition Act was the reason for the proceedings against the vessels.

The government did not go it blind in these cases, and never has to; for obviously it cannot be ascertained whether a vessel's cargo is or is not properly manifested until its nature and quantity is determined, nor can it be told whether a vessel's loading is in violation of its license until the nature of its cargo is determined.

When the facts involved are thus discovered, if the vessel is known to have been engaged in transportation within our territorial waters, and if her cargo be found to contain [fol. 53] alcoholic beverages of more than the legal alcoholic content, a violation of the National Prohibition Act is made out, and the persons on board her are punishable thereunder criminally, and, unless the criminal proceeding is unsuccessful, as in United States v. 2180 Cases of Champagne, 9 F. (2d) 710, 712, 713 (C. C. A. 2), there follows forfeiture of the offending vessel.

From the decision of the Supreme Court in the Richbourg Case, I think it is clear that, if forfeiture of the vessel is sought under such circumstances as we find in these two cases, it should be sought under section 26 of title 2 of the National Prohibition Act in order that the innocent owner of or lienor on the vessel may not be victimized as an incident to the operation and enforcement of that important sumptuary edict.

To proceed under another statute in the face of the specific instructions contained in section 26 of title 2 of the National Prohibition Act seems to me to imply nothing less than a ruthless disregard on the part of the government of the possible property rights of innocent parties.

Decrees in accordance with this opinion may be submitted for signature in each of these cases on two days' notice.

[fol. 54] In United States District Court, Southern District of New York

Present Hon. John M. Woolsey, United States District Judge

A 97-88

United States of America, Libellant,

against

British SS. "Sebastopol"

Decree Dismissing Libel—Jan. 26, 1931

This cause having come on to be heard for trial upon the pleadings and proofs and having been argued and submitted by the attorneys for the respective parties, and the Court, after due deliberation having rendered its decision dismissing the libel herein, it is

Ordered, adjudged, and decreed that the libel herein be and the same hereby is dismissed without costs, and it is further

Ordered, adjudged, and decreed that unless the libellant perfects its appeal within the time prescribed by law, the stipulation for value in the sum of Seven thousand five [fol. 55] hundred ($7,500) Dollars executed by the claimant herein and the Union Indemnity Company of Louisiana, together with a stipulation for costs in the sum of Two hundred fifty ($250) Dollars be cancelled, and it is further

Ordered, adjudged, and decreed that if an appeal be taken, the execution of this decree shall be stayed and suspended until the determination of the appeal in this matter.

John M. Woolsey, U. S. D. J.

In United States District Court

[Title omitted]

Assignment of Error

Comes now the United States of America, the appellant herein, and files the following assignments of error, upon

which it will rely for the appeal from the final decree made and entered herein on January 27, 1931:

[fol. 56] I. The Court erred in making and entering the decree appealed from.

II. The Court erred in holding that the filing of a stipulation for value by the claimant did not waive the right to contend that the libels were brought under the wrong statute.

III. The Court erred in finding that the libellant had failed to prove a violation of Section 584 of the Tariff Act of 1922.

IV. The Court erred in finding that the libellant did not prove the cause of action under Section 584 of the Tariff Act of 1922.

V. The Court erred in finding that the penatly provisions of the Tariff Act of 1922 did not supersede the provisions of the National Prohibition Act of October 28, 1919.

V. The Court erred in finding that the penalty provisions National Prohibition Act of October 28, 1919, superseded the Tariff Act of 1922 within the limits of one marine league.

VII. The Court erred in finding that Section 26 of the National Prohibition Act of October 28, 1919, was paramount and mandatory as an alternative basis of forfeiture to Section 584 and 594 of the Tariff Act of 1922.

VIII. The Court erred in finding that when, in the discovery of the violations of the provisions of the Tariff Act of 1922, the transportation of liquor was also involved, [fol. 57] that the libellant was compelled to proceed under the provisions of the National Prohibition Act of October 28, 1919, Section 26, governing forfeiture of vehicles for transportation of intoxicating liquors to the exclusion of the provisions of the Tariff Act of 1922.

IX. The Court erred in failing to deny the motion to dismiss the libel at the close of the libellant's case.

Wherefore appellant prays that the final decree of the United States District Court be reversed and a decree be

entered directing forfeiture under Sections 584 and 594 of the Tariff Act of 1922.

Dated New York, February 21, 1931.

George Z. Medalie, United States Attorney for the Southern District of New York, Solicitor for Appellant, Broadway and Park Row, Old P. O. Building, Borough of Manhattan, City of New York.

[fol. 58] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL

SIR: Please take notice that the libellant, United States of America, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit, from the final decree signed by the Hon. John M. Woolsey, one of the Judges of this Court, and entered herein on January 27, 1931, and that the libellant hereby appeals from each and every part of said decree as well as the whole thereof.

Yours, etc., George Z. Medalie, United States Attorney, Southern District of New York, Proctor for Libellant.

[fol. 59] To Louis Halle, Esq., Proctor for Claimant, 152 West 42nd Street, Borough of Manhattan, City of New York; Clerk of the District Court of the United States for the Southern District of New York.

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR LEAVE TO APPEAL

To the Honorable Judges of the United States District Court for the Southern District of New York:

Comes now the United States of America, by its solicitor, George Z. Medalie, United States Attorney for the South-

ern District of New York, and feeling aggrieved by the [fol. 60] final decree made and entered herein on January 27th, 1931, by this Court, complained that in the record and proceedings had in such cause manifest error has happened, to the great damage of the petitioners, as set forth in the assignments of error annexed hereto.

Wherefore the libellant, the United States of America, does hereby appeal from said final decree of this Court to the Circuit Court of Appeals for the Second Circuit, and prays that its appeal may be allowed, and the papers upon which said decree is made, duly authenticated, be sent to the Circuit Court of Appeals for the Second Circuit, and that the same may be corrected; and it is further prayed that an order be made herein that pending the hearing and final determination of the appeal in the above-entitled proceeding and the entry of the order on mandate, the execution of this decree by the claimant or his proctor be stayed and the discharge and cancellation bond be stayed.

Dated New York, February 21, 1931.

George Z. Medalie, United States Attorney for the Southern District of New York, Attorney for Petitioner, Old P. O. Building, Broadway and Park Row, New York City.

[fol. 61] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL

The libellant in the above-named libel, feeling aggrieved by the final decree entered herein on the 27th day of January, 1931, does hereby appeal from the said final decree to the United States Circuit Court of Appeals for the Second Circuit, and prays that this appeal may be allowed.

And now, on this 21st day of February, 1931, it is

Ordered that the appeal be allowed as prayed for, and

It is further ordered that pending the hearing and final determination of the appeal in the above entitled action and the entry of an order on mandate, the claimant and his proctor are hereby stayed from executing the decree in this case, and

It is further ordered that the discharge and cancellation of the bond are hereby stayed pending the hearing [fol. 62] and final determination of the appeal in the above-entitled action and the entry of an order on mandate.

Wm. Bondy, U. S. D. J.

Dated February 21, 1931.

(Filed February 24, 1931.)

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Libellant-Appellant,

against

SS. "SEBASTOPOL," Her Engines, Tackle, Apparel and Furniture, etc., Claimant-Appellee

ORDER DISPENSING WITH PRINTING OF EXHIBITS

Upon reading and filing the annexed consent and on the motion of George Z. Medalie, Proctor for the Libellants, it is

Ordered that the following exhibits need not be printed, but that the originals or photostatic copies thereof may be [fol. 63] referred to upon the arguments in this Court, with the same force and effect as though printed in the record:

Government's Exhibit I—Map as to location of the SS "Sebastopol," when sighted, and when seized.

Government's Exhibit II—Certificate of British registry.

Government's Exhibit III—Agreement and account of crew.

Government's Exhibit IV—Purported manifest.

Government's Exhibit V—Name plate "Westmoreland."

Government's Exhibit VI—Name plate "Sebastopol"; on the back, "Mary Emily."

Government's Exhibit VII—Name plate "Mary Emily."

Government's Exhibit VIII—Name plate "Westmoreland."

Government's Exhibit IX—Name plate "Westmoreland, Norfolk, Va."

Government's Exhibit X—Name plate "Mary Emily, St. Johns, N. F."

Government's Exhibit XI—Name plate "Sebastopol, St. Johns, N. F."

[fol. 64] Government's Exhibits XII, XIII, XIV, XV—Samples of cargo taken from the SS "Sebastopol."

Sept. 22, 1931.

Manton, U. S. C. J.

We hereby consent to the entry of the foregoing order. Dated New York, Sept. 22, 1931.

George Z. Medalie, United States Attorney, Proctor for Libellant. Louis Halle, Proctor for Claimants.

[fol. 65] Citation, in usual form, omitted in printing.

[fol. 66] In United States District Court

[Title omitted]

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled action as agreed upon by the parties. Dated New York, December 2, 1931.

George Z. Medalie, United States Attorney, Proctor for the United States, Libellant. Louis Halle, Proctor for Claimant.

[fol. 67] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 68] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Libellant-Appellant,

vs.

BRITISH SS. "SEBASTOPOL," Her Engines, Tackle, Apparel and Furniture, etc., Claimant-Appellee

UNITED STATES OF AMERICA, Libellant-Appellant,

vs.

Two-masted Auxiliary Schooner "RUTH MILDRED," Length 82 Feet; Beam, 21.5 Feet; Depth, 8.1 Feet; Official No., 222218, Claimant-Appellee

Before L. HAND, SWAN and AUGUSTUS N. HAND, Circuit Judges

Appeals from the District Court of the United States for the Southern District of New York

Libels of information in the admiralty were filed by the United States, one seeking forfeiture of the British steamer Sebastopol for violation of the customs laws, the other seeking forfeiture of the American schooner Ruth Mildred for violation of the navigation laws. In each suit a decree was entered dismissing the libel, and the libellant has appealed. Decree as to the Sebastopol reversed; decree as to the Ruth Mildred affirmed.

For opinion below see 47 F. (2d) 336.

George Z. Medalie, United States Attorney, for Appellant.

Arthur H. Schwartz, Assistant U. S. Attorney, Advocate.

[fol. 69] Arthur W. Henderson, Special Assistant Attorney General, of Counsel.

Louis Halle, Milton R. Kroopf, Proctors for Appellee.

OPINION

SWAN, Circuit Judge:

These appeals have been argued together and may be disposed of in a single opinion, although, as will appear,

somewhat different considerations are involved and have lead us to different results in the two suits. The general problem presented is whether a vessel which is discovered in the illegal transportation of liquor within territorial waters must be proceeded against under sec. 26 of Title II of the National Prohibition Act (27 U. S. C. A. sec. 40) rather than for a violation of the customs or navigation laws.

The libel against the Sebastopol sought to enforce against her, pursuant to section 594 of the Tariff Act of 1922 (19 U. S. C. A. sec. 498), penalties incurred by her master under section 584 of said Act (19 U. S. C. A. sec. 486) by reason of false manifesting of the cargo. Within territorial waters she was stopped and boarded by a coast guard officer who upon discovery that her cargo was falsely manifested arrested the master and seized the vessel. The unmanifested cargo consisted of 4841 cases of Scotch whiskey. Following seizure of the vessel, the coast guard officer signed a complaint charging the master and crew with conspiracy to violate the National Prohibition Act as well as the Tariff Act of 1922. Nothing appears as to the ultimate disposition of this complaint. These facts, the claimant contended, disclosed that the vessel was engaged in the illegal transportation of liquor and required the government to proceed against her in accordance with section 26 of title II of the National Prohibition Act (27 U. S. C. A. sec. 40) [fol. 70] instead of under the Tariff Act. The district court so held, dismissing the complaint.

That the seizure was not made by a prohibition officer would not preclude the government from proceeding under section 26. Dodge v. United States, 272 U. S. 530; Commercial Credit Co. v. United States, 276 U. S. 226. That section preserves the rights of innocent owners or lienors; while forfeiture under the Tariff Act proceeds without regard to innocent interests. It is true that executive clemency may remit the forfeiture in favor of innocent persons (19 U. S. C. A. secs. 520, 532), but mitigation by grace is not the equivalent of statutory immunity from forfeiture. The two procedures are, therefore, in direct conflict when applied to the forfeiture of a vessel seized within territorial waters while transporting unmanifested liquor; and the Prohibition Act, were it the later enactment, would pre-

vail, as the Supreme Court held it did with respect to Revised Statutes sec. 3450. Richbourg Motor Co. v. United States, 281 U. S. 528. But it is to be observed that the particular sections of the Tariff Act under which the libel against the Sebastopol was framed do not declare a forfeiture of the vessel; they merely impose a lien upon her for the payment of penalties incurred by the master. It may well be argued that a proceeding to enforce a lien under the Tariff Act is not in direct conflict with the proceeding to forfeit the vessel contemplated by section 26. Only by accident is it true in the case at bar that the penalty incurred is so great as to exhaust the entire value of the vessel and result in her forfeiture. The two statutes are to be read so that both may stand, if possible, and we are [fol. 71] disposed to say that no direct conflict appears when only the lien of a penalty is being enforced.

But if there be a direct conflict, the Tariff Act must prevail over sec. 26. It is the later enactment and contains in sec. 644 an express repeal of "all laws and parts of laws inconsistent with the provisions of this Act." In reaching this conclusion we are not unmindful of the canon of construction that an earlier specific statute may be considered an exception to a later general statute broad enough in terms to include the subject matter of the former; but we do not think it applicable here, because the Tariff Act itself deals specifically with the importation of liquors in violation of the customs. Paragraph 813 of schedule 8 reads as follows:

"No wines, spirits, or other liquors or articles provided for in this schedule containing one-half of 1 per centum or more of alcohol shall be imported or permitted entry except on a permit issued therefor by the Commissioner of Internal Revenue, and any such wines, spirits, or other liquors or articles imported or brought into the United States without a permit shall be seized and forfeited in the same manner as for other violations of the customs laws."

The forfeiture thus directed is provided for in section 584, which declares, among other things, that unmanifested merchandise (which by section 401 "includes merchandise the importation of which is forbidden") consigned to the

master shall be subject to forfeiture. Under the doctrine of The Mistinguette, 27 F. (2d) 738 (C. C. A. 2) the liquor on the Sebastopol was consigned to her master. It was therefore forfeitable under section 584, and it seems clear that the other provisions of this section which impose a penalty upon the master equal to the value of the unmanifested cargo are likewise applicable although the cargo [fol. 72] be liquor. Similarly, as to the ancillary section 594 which subjects the vessel to a lien for the penalties incurred by the master. Therefore, notwithstanding the above-mentioned canon of interpretation and despite the statement in paragraph 801 of the schedule that nothing in this schedule shall be construed as limiting or restrict the provisions of the National Prohibition Act, we cannot interpret sections 584 and 594 otherwise than as applying specifically to an unmanifested cargo of intoxicating liquor and as superseding pro tanto the earlier enacted section 26, if a conflict exists. Consequently the libel brought against the Sebastopol was erroneously dismissed.

Different considerations are applicable to the schooner Ruth Mildred. She was licensed to engage in the fisheries and was charged with violating her license by engaging in the illicit liquor trade. Forfeiture was sought under Revised Statutes sec. 4377. Violation of her license results under this statute in forfeiture of the vessel without regard to the innocence of her owner. This section antedates the National Prohibition Act and is therefore superseded by section 26 so far as the two statutes are in direct conflict. As already noted with respect to the Tariff Act, the possibility of executive clemency under the provisions of Revised Statutes section 5294, will not avoid the conflict. Dismissal of the libel against the Ruth Mildred was therefore right provided she was seized under circumstances which rendered section 26 applicable.

The schooner was trailed by a coast guard vessel from a point in Long Island Sound until she tied up at a dock in New York harbor. The crew and master then left her, [fol. 73] but a few minutes later the master returned and, on being informed that the coast guard vessel was going to stand by until the schooner's cargo was unloaded, he confessed that most of his cargo was liquor. Thereupon he was placed under arrest, the boat was seized, and a com-

plaint filed, charging the master with conspiracy to violate the National Prohibition Act and the Tariff Act of 1922. Nothing further is disclosed regarding this proceeding.

Section 26 directs that when a person is discovered in the act of illegally transporting liquors in any water craft, the officer of the law shall seize the liquors "therein being transported contrary to law" and shall take possession of the boat. When the schooner and her cargo were seized she had come to rest at the wharf, and it may be argued with some plausibility that the transportation was over so that section 26 no longer applied. United States v. One Buick Automobile, 33 F. (2d) 353 (S. D. Ga.); cf. (before transportation began) United States v. One Ford Coupe Automobile, 272 U. S. 321; United States v. One Studebaker Coach Automobile, 32 F. (2d) 866 (C. C. A. 9). But we do not think the section should receive so technical a construction. Here the master was discovered in the act of transportation, although knowledge of the nature of his cargo was not obtained until his subsequent confession. In our opinion his possession of the liquor continued to be a possession incident to transportation, and the facts were sufficient to satisfy the condition precedent to making a seizure under section 26. See Commercial Credit Co. v. United States, 33 F. (2d) 228 (C. C. A. 9); United States v. One Chevrolet Automobile, 21 F. (2d) 277 (D. Ala.), aff'd [fols. 74 & 74½] as United States v. General Motors Acceptance Corp., 25 F. (2d) 238 (C. C. A. 5); United States v. One Buick Coach Automobile, 34 F. (2d) 318 (N. D. Ind.). Accordingly, we affirm the decree dismissing the libel as to the Ruth Mildred.

The problem presented by these appeals has been the subject of considerable diversity of opinion in the various circuits. An authoritative decision may soon be expected as the Ninth Circuit has certified a similar question to the Supreme Court. Gen. Motors Acceptance Corp. v. United States, Nov. 23, 1931. Pending this decision any elaborate consideration of the authorities seems unnecessary. It will suffice merely to cite a few of them. As tending to favor the contentions of the appellant, see The Pilot, 43 F. (2d) 291 (C. C. A. 4); United States v. One Reo Coupe Automobile, 46 F. (2d) 815 (D. Mass.); The Daisy T, 48 F. (2d) 370 (D. Del.); contra, Colon v. Hanlon, 50 F. (2d) 353 (C. C. A. 1);

Commercial Credit Co. v. United States, 53 F. (2d) 977 (C. C. A. 5); United States v. One Studebaker Automobile, 45 F. (2d) 430 (D. Ariz.).

Decree in No. 279 reversed, and decree in No. 280 affirmed.

[fol. 75] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

UNITED STATES, Libellant-Appellant,

vs.

British SS. "SEBASTOPOL", GENERAL IMPORT & EXPORT Co. LTD., Claimant-Appellee

DECREE—Filed March 9, 1932

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, reversed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 76] [File endorsement omitted.]

[fol. 77] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 78] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 28, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately

following No. 734, United States of America vs. Commercial Credit Company, Inc.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,625. U. S. Circuit Court of Appeals, Second Circuit. Term No. 811. General Import & Export Company, Inc., petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed March 21, 1932. File No. 36,625.

